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No. 08 –402

OCT 28 2008

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,

Petitioner,

v.

KARIN J. MORTON

Respondent.

On Petition For A Writ Of Certiorari
To The United States Supreme Court

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

In *Colorado v. Connelly*, 479 U.S. 157, 167 the Court held "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." In this case, the Kansas Supreme Court held that a suspect's confession was rendered involuntary for due process purposes because a government agent made a single misleading but non-coercive statement to the suspect, even though the court explicitly found that (1) there was no Miranda violation, (2) the agent made no false statements about the evidence against the suspect nor about the applicable law, and (3) "there was nothing coercive about the manner and duration of the interview."

This case thus presents the following questions:

Whether police deception standing alone, can render an otherwise voluntary confession "involuntary" for due process purposes?

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An Appendix was not included as the Petitioner's have submitted the two rulings on State v. Morton.

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PETITION IN OPPOSITION TO THE WRIT OF CERTIORARI

Karin J. Morton, Respondent, respectfully requests that this Court deny the Petitioner's petition for a writ of certiorari and uphold the findings of the Kansas Supreme Court in the cited matter.

OPINIONS BELOW

The July 3, 2008, opinion of the Kansas Supreme Court (Pet. App. 1a-44a) is reported at 186 P.3d 785 (Kan.2008). The Kansas Court of Appeals opinion (Pet. App.45a-51a) is unpublished. No. 97,848, 2007 WL 2080540 (Kan.Ct.App. July 20, 2007.

JURISDICTION

The Kansas Supreme Court rendered its decision on July 3, 2008. This brief in opposition of the petition for writ of certiorari has been filed within 30 days of docketing, as required by Supreme Court Rule 15.3. This Court has jurisdiction pursuant to 28 U.S.C. 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

"nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;"

U.S. CONST. amend. V

"In all criminal prosecutions, the accused shall . . . and to have the Assistance of Counsel for his defense"

U.S. CONST. amend VI

"Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV

COUNTERSTATEMENT OF THE CASE

1. The respondent understands it is not the role of this court to re-weigh evidence, however the Statement as authored by the Petitioners is riddled with fallacies of fact that bear on the case at hand. The Respondent Karin J Morton did in fact work for the Ottawa Recreation Commission (ORC), a taxpayer-funded, local government entity that provides recreation services for the USD #290 taxing district, not for the City of Ottawa, Kansas. The Respondent was authorized to purchase surplus state as well as federal government property.

The Respondent purchased 2 federal surplus trailers at a federal surplus liquidation, one for the ORC and one, intended at the time of purchase, for personal use. It is important to note that additional trailers were purchased by other employees of the ORC. It was the first visit by the staff to the federal surplus property yard. Prior purchases were made through the State Surplus Property system which openly allowed for personal purchase of surplus property. Upon purchase of the items at the Federal site, it is well documented in lower court transcripts that none of the individuals including the Respondent were made aware by federal surplus property officials that Federal property was subject to more restrictive rules specifically, federal surplus property was to be used solely for public purposes.

ORC staff members became aware of the federal surplus buying regulations several weeks after the purchase when the invoices arrived. Upon discovery, the Respondent abandoned her desire of purchasing a trailer as a gift for her husband and other employees that made similar purchases did the same. The ORC retained ownership and control of all property purchased from Federal Surplus. The respondent was instructed by the Administrative Board of the ORC to leave the trailer where it was (at the respondents permanent address) until instructed to do otherwise.

Verification documentation was later received by the ORC discussing the utilization of the acquired property. Several months later, the respondent, as noted in the record, hurriedly fill out certification paperwork as she was leaving town for vacation. All certification documents were filled out in the same manner - regardless of which piece of equipment was noted. The respondent did not as a matter of record verify with any employee which piece of equipment was which. The forms were filled out based upon her knowledge of usage at that time

The Petitioner's statement contains a distorted order of events that presents the basis of the case at hand in a purposely biased fashion. Contrary to the Petitioner's statement, Paul Schwartz did not "notice" a trailer at the Respondent's residence. The ORC, under Morton's leadership self-reported an error in purchase. An investigation was sponsored by the ORC Board as well as an independent counsel. It was ruled the employees, cluding the Respondent, did nothing intentional. Upon conclusion of this investigation

a disgruntled community member filed a theft report solely against the Respondent. It was this community member that sought out Paul Schwartz and, through a faxed communication to his office portrayed the event in an entirely different light as well as insinuated there was a "cover-up" by the ORC board. The original police report notes the complaintant to be Janice Swallow.

An investigation was conducted into the trailer purchase. The respondent and her counse cooperated with the OPD investigation at every step. Upon the conclusion, the police department and the County Attorney Heather Jones publicly announced the investigation had concluded and there were "no grounds for prosecution".

Months later, Special Agent John Pontius of the Government Service Administration (GSA) contacted the Respondent for a "follow-up" interview. The GSA is the official procurement agency for federal entities – substantially administrative in nature. Agent Pontius entered into the latter stages of the ORC sponsored investigation as the administrative authority that would ultimately decide whether or not the ORC was allowed to retain ownership of the trailers or be instructed to return them to the Federal Surplus lot

Pontius did in fact attempt to contact the Respondents counsel of record, however it is important to note that attorney Scott Ryburn, respondent's counsel, had at that juncture

joined local government as the County Counselor, working along side of County Attorney Heather Jones.

The Respondent did agree to meet with Pontius. The Respondent specifically inquired as to the nature of the interview as well as the need to have counsel present. Contrary to the statement of the petitioners, Pontius testified that it was "not that kind of interview" at the suppression hearing this fact is reflected in the transcript. As had been demonstrated by the Respondent through previous interviews, each and every interview attended with counsel, had the true nature of the interview been revealed, the Respondent would have certainly appeared with counsel and requested the benefits afforded by a standard interview room, equipped with audio and video recording capability. Agent Pontius clearly interfered with the respondent's access to legal counsel.

The District Court ruled that in evaluating the "totality of the circumstances" issues regarding Miranda, issues regarding the right to counsel, and issues regarding the voluntaries and free will of the respondent's statement and most importantly the intentional misrepresentations of Agent Pontius that a fundamental unfairness was created, therefore, the motion to suppress was sustained.

The Kansas Court of Appeals focused solely on the Miranda issue and reversed the trial court. However the appeals court did recognize the lower courts findings of evidence supporting suppression.

The Respondent filed and was granted review on the basis of the "totality of the circumstances". On review, the Supreme Court struggled with many elements of the case finding various actions in regards to liberties guaranteed through the Fifth, Sixth and Fourteenth amendments. An audio record of the Kansas Supreme Court oral argument on this case can be accessed at http://www.kscourts.org/kansas-courts/supreme-court/archived-arguments-March-2008.asp.

Under the "totality of the circumstances, the Kansas Supreme Court reversed the lower court's ruling citing that the conduct of Agent Pontius in noting the interview was "not that kind of interview" coupled with the fact that Pontius's status as a criminal investigator was not patently apparent to the Respondent, statements given or reported to be "given therein were not the product of her free and independent will and thus inadmissible".

Citing State v. Swanigan, the court states ""In determining whether a confession is voluntary, a court is to look at the totality of the circumstances. The burden of proving that a confession or admission is admissible is on the prosecution, and the required proof is by a preponderance of the evidence. Further the case law states "the essential inquiry in determining the voluntariness of a statement is whether the statement was the product of the free and independent will of the accused." (quoting *State v. Baston*, 261 Kan. 100, 105, 928 P 2d 79 [1966]). Additionally, the Court cited Beckwith v. United States. , State v. Ackward, and State v. Walker as precedence for the ruling.

The Court noted the importance of the fact that Agent Pontius mislead the Respondent about the nature of the interview – he had consorted with the County attorney to obtain additional information on her behalf, yet when specifically asked by the Respondent the nature of the interview – i.e. – "do I need my attorney present" – Pontius noted it was "not that kind of interview". Pontius knew Morton HAD an attorney that had accompanied her to prior interviews yet denied any need for his presence and in this act deceived the Respondent as to the criminal nature of the interview.

In addition, Pontius was not a uniformed officer, his business card states "Special Agent" not criminal investigator as the Petitioners have suggested. The noted factors in the present case clearly posed significant barriers to the respondent's statements being made of her free and independent will. This Court has held that this prong is an essential inquiry to determining voluntariness of the statement.

REASONS FOR DENYING THE WRIT

1. The question for review is flawed as stated by the Petitioner's. The Kansas Supreme Court did not rule that police deception, standing alone rendered the statement involuntary for due process purposes. They did rule however, that this element, viewed in a "totality of the circumstances", rendered this interview inadmissible. The Fifth Amendment guarantees citizens the right to fundamental fairness in all dealings the government has with its people – the State, in conjunction with Agent Pontius, violated this right.

2. *Connelly v Colorado* is inappropriate case law and distinguishable over the present facts. This case presents the circumstance of a mentally ill individual – voluntarily approaching a uniformed officer and confessing to a murder. In this case, the Court specifically ruled that coercive police activity would be the predicate to finding this defendant's confession involuntary. Mental illness is not before this court. Seeking out a uniformed police officer is not before this court. An apparent connection of the Agent to the criminal process does not exist and is not in front of this court. Dissenters in the above cited ruling warned that this precedent could be viewed as abandoning two hundred years of jurisprudence and weighed concern over how this ruling would be applied.

3. The Petitioners have presented no evidence that this is a recurring constitutional question, in fact, the specifics of this case are so isolated and narrow – the Respondent

spent literally hundreds of hours searching for federal, state even local case law with little result. The Court clearly ruled that in weighing all of the factors a fundamental unfairness to the respondent did exist in the actions of the Agent working in conjunction with the State of Kansas. Further, this case was and continues to be a case not of intentional wrongdoing - but an administrative mistake exploited for political gain. The County Attorney through her own police investigation (video taped and audio recorded), could identify no wrong doing and announced publicly that the investigation had no grounds for prosecution. Months later - due to harassment by a small political group - she sought the assistance of Agent Pontius in garnering additional information for the purpose of reinstating the investigation.

Agent Pontius acted in a "wholly inappropriate" manner in the pretense of an administrative interview when he clearly was conducting a criminal investigation for the benefit of the County Attorney. His intentional misrepresentation presents a situation where there is no "official record" of the conversation that transpired that day. There is no reliable evidence that a confession even occurred. The conduct of the justice system in this case is inexcusable, certainly is suspect to prosecutorial misconduct and was correctly rejected by the Kansas Supreme Court.

The case was moved and ordered dismissed by the State following the Supreme Court ruling. It was then days prior to the issuance of the mandate that the order was rescinded and the Solicitor General stepped in. It is difficult to discern that this type of activity is rampant throughout the land. Even more absurd is the fact that the Petitioner's believe

that the lowest level felony crime in the State of Kansas - punishable by, in this case, at most probation involves a constitutionally significant precedent, and embodies imperative public importance enough to warrant the attention of the highest Court in the land.

CONCLUSION

The Petitioners have presented no compelling reason for this Court to review this case; accordingly, the Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Certificate of Mailing

On this 28th Day of October, 2008 I forward a true and complete copy of the Brief in Opposition to the Petition for Certiorari to the United State Supreme Court case number 08-402 by United States Postal Service Priority Mail to:

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